IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 419 of 2007
With
CRIMINAL MISC.APPLICATION No. 2367 of 2007
In CRIMINAL APPEAL No. 419 of 2007
With
CRIMINAL APPEAL No. 396 of 2007
With
CRIMINAL MISC.APPLICATION No. 2259 of 2007
In CRIMINAL APPEAL No. 396 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KALUBHAI HUSENBHAI SHEIKH - Appellant(s)
Versus
THE STATE OF GUJARAT - Respondent(s)

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Appearance:

MR RAJESH M AGRAWAL, MR IY SHAIKH AND MR YOGESH R AGRAWAL for Appellants in both the appeals.
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent in both the appeals.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 14/03/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in these two appeals filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 19.2.2007 rendered in Sessions Case No. 298 of 2005 by the Additional Sessions Judge, Fast Track Court No.3, City Sessions Court, Ahmedabad by which the appellants of both these appeals who are original accused Nos.1 and 2 respectively ('A-1' and 'A-2' for short) have been convicted for commission of the offences punishable under Sections 8 (c) and 20 (b) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and both of them are sentenced to suffer RI for ten years and fine of Rs.1,00,000/-

i.d, RI for further period of one year.

2. Since both these appeals arise out of the same judgment and order of conviction and sentence recorded against both the accused and the question relates in narrow compass with respect to giving benefit of rationalised sentence structure as per the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act No.9 of 2001) as A-1 was found with contraband article ganja less than commercial quantity and A-2 was found with contraband article ganja which is a small quantity, with the consent of the learned advocates appearing for the parties, both the matters are taken up for final hearing today, heard together and decided by this common judgment and order.

3. The prosecution case as disclosed from the complaint and unfolded during trial, is as under:

3.1. On 3.7.2005, V.V. Chaudhari, Deputy

Commissioner of Police, Zone VI, Ahmedabad City constituted two teams for doing combing in Bengali Vas, Shah-Alam, Maninagar. One team consisted of P.W.13, Himanshu Chandravadan Pathak, Zala PSI and V.V. Chaudhari, Deputy Commissioner of Police whereas the second team consisted of S.H. Patel, 2nd PSI, Zala PSI and other staff members. After constituting both the teams, both the teams went to the hutment of Bengali Vas, Navabnagar area between 18.00 hours to 20.30 hours for combing. They could not find any offending article from there. Thereafter they went to Nilgiri huts near Chandola Talav. When they reached near Dipak Kariyana stores, they saw one person wearing yellow coloured full sleeve shirt and one dark green pant coming. He had a dark-green bag in his hand. On seeing them, he frightened and tried to run away. He was apprehended and his person was searched and for that purpose two panchas were called. Thereafter they were introduced to each other. On inquiry he informed his name as Kalubhai Husenbhai Sheikh

(A-1) resident of the hutment at Bengali Vas, Navabnagar, Chandola Talav, Maninagar. On further inquiry about the bag, he said that there was ganja in the said bag. Thereafter the panchas and A-1 searched each other. Thereafter A-1 was informed by V.V. Chaudhari, Deputy Commissioner of Police that he is a gazetted officer and he is empowered to search the person of the accused. However, if he desires that he shall be searched by another gazetted officer or an Executive Magistrate, he will make arrangement for the same. However, the accused opted that V.V. Chaudhari may search him. Accordingly, V.V. Chaudhari searched A-1 in presence of the panchas and other police personnels. During the search of the person of A-1, from the dark-green coloured bag, one transparent plastic bag tied with string was found and from the said plastic bag contraband article was found. On testing the said article, it was found to be ganja. Thereafter V.V. Chaudhari arranged to call for a person who can weigh the contraband article and

also an officer from FSL who can verify whether the said substance was ganja or not. The FSL officer certified that the said substance was ganja. On weighing the said substance, it was found to be 1Kg. 310 grams and after deducting 16 grams being the weight of the plastic bag, the net weight of the ganja was 1 Kg. 294 grams the market value of which was Rs.12,940/- The said ganja was seized and seizure memo was given to A-1. From the contraband article, some portion was taken separately and sealed for sending to FSL for analysis and also for reserve sample. Thereafter the seizure and sealing procedures were completed. A-1 was arrested and arrest memo was given to him.

3.2. A complaint for the aforesaid incident was filed by P.W.13, Himanshu Chandravadan Pathak against A-1.

3.3. On registration of the complaint, investigation was put into motion. During the

course of investigation, A-1 stated that he purchased the said contraband article Ganja from one Govindbhai alias Tanatan Bapu Ramavatar Tivari, resident of Pathkeshwar Hanuman Mandir, Near Memco Crossing, Meghaninagar, Ahmedabad (A-2). Therefore they raided the premises of A-2 on 7.7.2005 and in presence of panchas from him 300 grams of contraband article was found and on preliminary test it was found to be ganja. Thereafter a part of the said contraband article was taken to send to FSL for chemical analysis and thereafter sealing procedure was completed. A-2 was arrested and arrest memo was given to him. A complaint was registered against him also. During the course of investigation, the samples of the contraband articles recovered from A-1 and A-2 were sent to FSL for chemical analysis. On receipt of the analysis report from the FSL certifying that the muddamal sent for analysis was ganja and as incriminating evidence was found against the accused persons, both the accused were charge-sheeted before the learned Principal

Sessions Judge, City Sessions Court, Ahmedabad for commission of the offences punishable under Sections 8 (c) and 20 (b) read with Section 29 of the NDPS Act.

3.4. The learned Additional Sessions Judge, Fast Track Court No.3, City Sessions Court, Ahmedabad to whom the case was made over for trial, framed charge against the accused persons for commission of the offences punishable under sections 8 (c) and 20 (b) read with Section 29 of the NDPS Act. The charge was read over and explained to the accused persons. The accused persons pleaded not guilty to the charge and claimed to be tried and thereupon they were put to trial by the learned Additional Sessions Judge, Fast Track Court No.3, City Sessions Court, Ahmedabad in Sessions Case No. 298 of 2005.

3.5. To prove the culpability of the accused, the prosecution has examined in all 17 witnesses

and relied upon their oral testimonies and also produced and relied upon the contents of 31 documents, the details of which have been given in para 3 of the impugned judgment and order.

3.6. After recording of the evidence of the prosecution witnesses was over, the trial Court explained to the accused persons the circumstances appearing against them in the evidence of the prosecution and recorded their further statement under Section 313 of the Code. In their further statement they denied the case of the prosecution in toto. They have not committed any offence. They stated that a false case has been filed against them by obtaining their signature on blank papers. A-2 has stated that he was also charge-sheeted earlier in one NDPS Act wherein he was acquitted and, therefore, he was again wrongly entrapped in this case. However, they have neither led any evidence nor examined any witness to support their defence.

3.7. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution beyond reasonable doubt that when A-1 was intercepted and apprehended, 1 kg. 294 grams of Ganja was recovered from a transparent plastic bag which was kept in a dark-green coloured bag whereas from A-2, 300 grams of ganja was found. Therefore, complicity of the accused persons for commission of the offence under the NDPS Act, has been proved. It is also held by the trial court that on the basis of the information supplied by A-1, from A-2 300 grams of ganja was recovered and therefore both of them have hatched criminal conspiracy and abetted each other in commission of the offences and, therefore, both of them are held guilty for commission of the offences punishable under Section 8 (c) and 20 (b) read with Section 29 of the NDPS Act. So far as sentence is concerned, the trial court held that from A-1, 1 Kg. 294 grams of ganja was recovered which is lesser than the commercial quantity but greater than small quantity whereas

from A-2, though 300 grams of ganja was found which is admittedly a small quantity, both the accused have conspired and abetted each other in committing the crime and, therefore, A-2 is equally responsible and hence both of them have been sentenced to suffer RI for 10 years and fine of Rs.1 lakh and in default of payment of fine, RI for further period of one year, giving rise to these two appeals at the instance of both the accused persons. Criminal Appeal No.419 of 2007 is filed by A-1 whereas Criminal Appeal No.396 of 2006 is filed by A-2.

4. Mr. Rajesh M. Agrawal, learned advocate for the accused persons, at the outset, submitted that so far as the conviction recovered against both the accused for commission of the offence punishable under Section 8 (c) and 20 (b) read with Section 29 of the NDPS Act is concerned, it is bad in law. According to him, both the accused were intercepted and apprehended on different dates and at different places and from both of

them ganja was found. From A-1, 1 Kg. 294 grams of ganja was found which is lesser than the commercial quantity but grater than the small quantity, therefore, the sentence awarded to him is disproportionate to the quantity found from him. He, therefore, urged that A-1 may be sentenced to suffer R.I. which is undergone by him, which according to him is more than 1 ½ years. So far as A-2 is concerned, he was found with only 300 grams of ganja which is admittedly a small quantity. However, the trial court has sentenced him to suffer R.I. for a period of ten years which is absolutely against the statutory provisions contained under the NDPS Act as according to him, punishment for small quantity is maximum imprisonment for a period of six months. He, therefore, submitted that the impugned judgment and order convicting both the accused for commission of the offences under Section 8 (c) and Section 20 (b) read with Section 29 of the NDPS Act is required to be altered by convicting both the accused separately for the offences under Section 8 (c) and Section

20 (b) of the NDPS Act. Therefore, A-1 may be sentenced to suffer imprisonment for the period of imprisonment already undergone by him as he has undergone sentence of more than 1 ½ years and A-2 may be sentenced to suffer imprisonment for a period of six months. A-2 has already undergone imprisonment of more than 1 ½ years. Therefore, both the accused may be ordered to be set at liberty forthwith and the appeals may be accordingly allowed qua conviction by altering it and qua sentence also.

5. Mr. K.T. Dave, learned Additional P.P. has candidly submitted that it is true that conviction recorded under Section 8 (c) and Section 20 (b) read with Section 29 of the NDPS Act against the accused persons is bad in law since both the accused were found with contraband article ganja on different dates and at different places and, therefore, they cannot be convicted with the help of Section 29 of the NDPS Act as there was no criminal conspiracy between both of them and there was no abetment made to each

other. Therefore, conviction is required to be altered by convicting them under Section 8 (c) read with Section 20 (b) of the NDPS Act. So far as A-1 is concerned, from him, 1 Kg. 294 grams of ganja was found. Therefore, the sentence may be suitably reduced but not to the extent of the period of imprisonment undergone by him but it may be reduced proportionately considering the quantity of 1 Kg. 294 grams of ganja found from him. So far as A-2 is concerned, he can be sentenced for a maximum period of six months and therefore in the case of A-2 also the sentence may be suitable altered. He therefore urged to pass appropriate order.

6. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with

reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

7. There is no dispute that on 3.7.2005 while doing combing the police personnels had intercepted and apprehended A-1 with contraband article ganja weighing 1 Kg. 294 grams whereas A-2 was apprehended and arrested on 7.7.2005 at a different place on the basis of the information given by A-1 during the course of interrogation and A-2 was found with contraband article ganja weighing 300 grams. Therefore both the accused were apprehended and arrested on different dates and at different places. Therefore it has to be held that there was no conspiracy hatched by both

of them nor there was any abetment made by each other. Both the accused were found with ganja on different dates and at different places and, therefore, both of them are liable for their individual act. In that view of the matter, conviction recorded against both the accused persons under Section 29 of the NDPS Act cannot be sustained. We, therefore, convict both the accused persons separately for their individual act for commission of offences under Section 8(c) read with Section 20 (b) of the NDPS Act for possessing contraband article ganja.

8. Now the next question which is required to be examined by us is as to whether the trial court has rightly sentenced both the accused for commission of offences punishable under Section 8 (c) and Section 20 (b) of the NDPS Act i.e., sentenced the accused considering the quantity of the contraband article ganja recovered from them.

9. At the outset be it noted that the NDPS Act, 1985 as amended by NDPS (Amendment) Act, 2001 is amended with a view to rationalize the sentence

structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. The statement of objects and reasons of the NDPS (Amendment) Act, 2001 is that Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are

punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

10. As per the notification - SO 1055 (E) dated 19.10.2001, at Serial No.23, the quantity of 1000 grams Ganja is a small quantity whereas quantity of 20 kg. Ganja is a commercial quantity. Therefore, it cannot be disputed that the quantity of 1 kg. 294 grams of Ganja found from A-1 was neither a small quantity nor a commercial quantity. Therefore, trial Court ought to have convicted and sentenced A-1 under Section 20(b)(ii)(B) of the NDPS Act taking into consideration the rationalized sentence structure. However, the trial Court, without considering this aspect, has imposed sentence of RI for ten years, which is the maximum sentence, which according to us,

is disproportionate to the quantity found from A-1. Recovery of contraband article Ganja weighing from 1.kg. 001 gram up to 19.999 grams would invite punishment under section 20 (b) (ii) (B) of the NDPS Act as the quantity is lesser than the commercial quantity but greater than small quantity and the punishment can be RI for a term which may extend to ten years, and with fine which may extend to one lakh rupees. In instant case, the quantity of contraband article Ganja recovered from A-1 is 1 Kg. 294 grams. In these circumstances, the rationalized sentence structure is required to be considered. Therefore, according to this court, the punishment imposed on A-1 is disproportionate to the quantity of contraband article recovered from him. In this view of the matter, according to us, the trial court has committed a serious error in not considering the objects and reasons of rationalized sentence structure in its proper perspective and we are of the view that if A-1 is sentenced to suffer R.I. for a period of three years and fine of Rs.50,000/- and in default of

payment of fine, R.I. for further period of 3 month, for commission of offences punishable under Section 8 (c) read with Section 20 (b) (ii) (B) of the NDPS Act, it would meet the ends of justice.

11. So far as A-2 is concerned, admittedly, from him 300 grams of ganja was recovered which is a small quantity. Therefore, the trial court ought to have convicted him for commission of the offence punishable under Section 20 (b) (ii) (A) of the NDPS Act where the maximum sentence prescribed is R.I. for six months. Therefore, A-2 deserves to be sentenced to suffer R.I. for six months and fine of Rs.25,000/- and in default of payment of fine, R.I. for further period of one month.

12. Seen in the above context, both the appeals deserve to be allowed partly qua altering conviction and sentence by reducing the sentence as mentioned in the earlier paragraph.

13. For the foregoing reasons, both the appeals succeed in part and accordingly they are partly allowed. While upholding the order of conviction recorded against both the accused persons for commission of offences under the NDPS Act, the conviction and sentence is altered and A-1 is convicted for commission of the offences under Section 8 (c) read with Section 20 (b) (ii) (B) of the NDPS Act whereas A-2 is convicted for commission of the offences under Section 8 (c) read with Section 20 (b) (ii) (A) of the NDPS Act. A-1 is sentenced to suffer R.I. for three years and fine of Rs.50,000/- i.d., R.I. for further period of three months whereas A-2 is sentenced to suffer R.I. for six months and fine of Rs.25,000/- i.e., R.I. for further period of one month.

14. Mr. Rajesh Agrawal, learned advocate for the accused persons, states that since A-2 has undergone total period of sentence of more than 1 ½ years, appropriate order, directing the jail authorities to release him may be passed.

15. Since A-2 has been sentenced to suffer R.I. for six months and fine of Rs.25,000/- i.d., R.I. for further period of one month and since he has undergone sentence of more than 1 ½ years, the jail authorities are directed to set A-2 at liberty forthwith, if his presence is not required in connection with any other case.

16. Since we have allowed both the appeals to the extent indicated above, Criminal Misc. Application No. 2367 of 2007 filed in Criminal Appeal No.419 of 2007 and Criminal Misc. Application No. 2259 of 2007 filed in Criminal Appeal No.396 of 2007 by A-1 ad A-2 praying to suspend the execution of sentence imposed upon both of them now do not assume any survival value and hence both the applications are disposed of. Rule issued in both these applications shall stand discharged.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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